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No. \_\_\_\_\_

IN THE SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1983

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CHRIS ALLEN MONTGOMERY,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

\*\*\*\*\*

PETITION FOR A WRIT OF  
CERTIORARI TO THE COURT  
OF CRIMINAL APPEALS OF ALABAMA

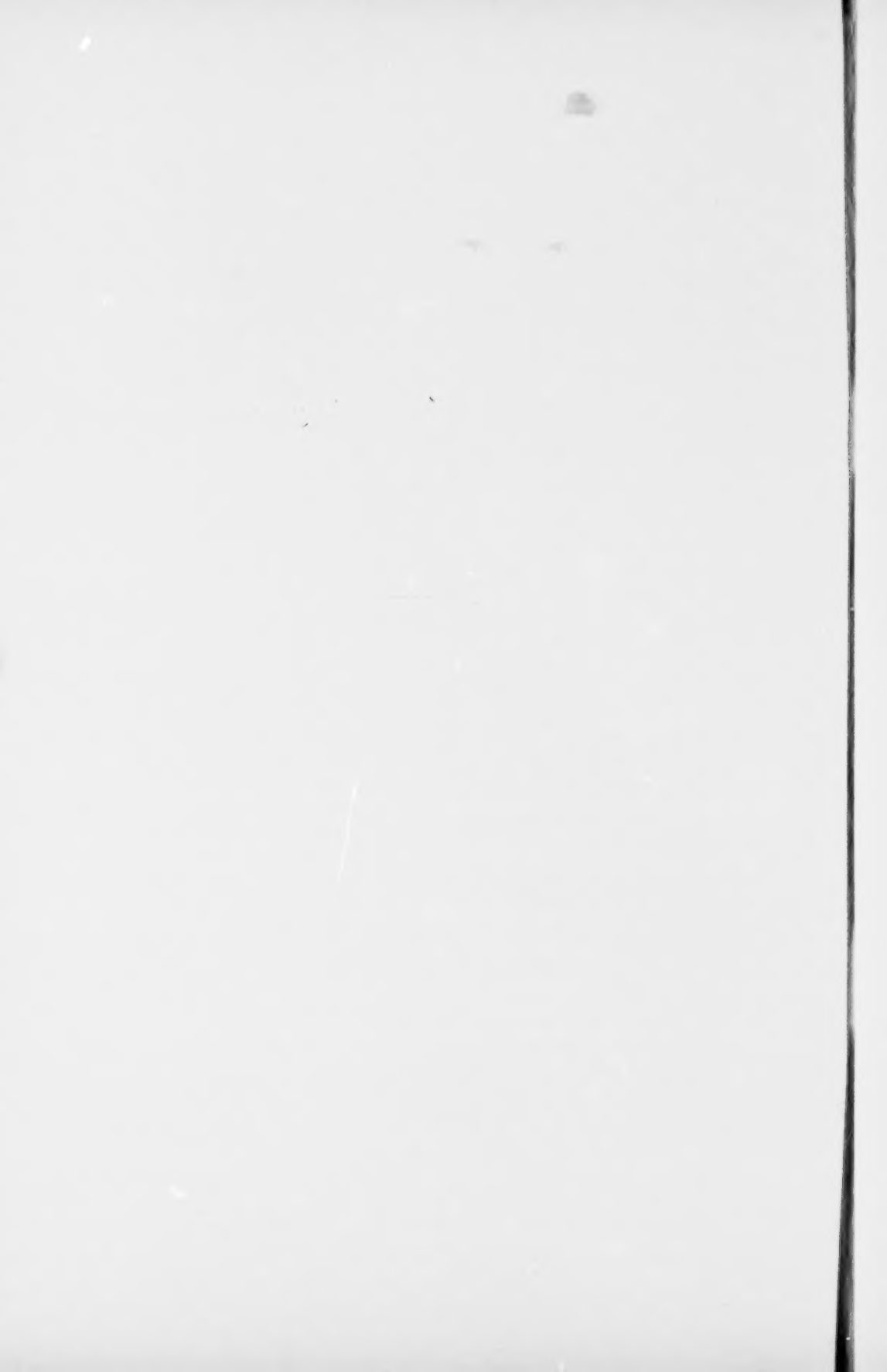
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BRIEF OF PETITIONER

\*\*\*\*\*

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### QUESTIONS PRESENTED

1. Were the Petitioner's due process rights violated when an alleged prior Federal conviction was used to enhance his punishment under the Alabama Habitual Offender Act although the conviction would not have been a felony under Alabama law?

2. Is the Alabama Habitual Felony Offender Act in compliance with the guidelines set forth by this Court in Solem v. Helm, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. \_\_\_\_, 77 L.Ed.2d 657 (1983), which established the precepts to follow in sentencing under recidivist laws?

### PARTIES

In the Circuit Court of Cullman County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Chris Allen Montgomery, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Cullman County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is not as yet reported but will be reported as follow:

Montgomery v. State, \_\_\_\_\_ So.  
2d \_\_\_\_\_ (Cr.App.Ala. 1983)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari is not as yet reported as follows:

Ex Parte: Chris Allen Montgomery  
In re: Montgomery v. State,  
\_\_\_\_\_ So.2d \_\_\_\_\_ (S.Ct.Ala, 1983)

A copy of the same is submitted in Appendix "B" to this petition.

## JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on March 2, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

## CONSTITUTIONAL PROVISIONS INVLOVED

The Constitutional provisions involved in Petitioner's writ include the Fifth Amendment to the Constitution of the United States, the Eighth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

### STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of § 13A-5-9, Code of Alabama, 1975, regarding punishment for habitual felony offenders and Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules. A copy of these statutes are submitted as Appendix "D" to this petition.

## STATEMENT OF THE CASE AND FACTS

### I

The Petitioner was tried with two co-defendants on charges of first degree robbery, and all were convicted. A sentencing hearing was held under the Alabama Habitual Offender Act, wherein each were sentenced to life without parole. A consolidated appeal followed to the Alabama Court of Criminal Appeals.

The basis of Petitioner's appeal was two-pronged. Initially, the Petitioner raised the constitutionality of § 13A-5-9, Code of Alabama, 1975, the habitual felony offender act, contending that it violated his rights under the Eighth Amendment to the Constitution of the United States. Secondly, the Petitioner alleged that the sentencing hearing held under the habitual offender act

was improper in that a prior Federal conviction was erroneously used to enhance his punishment and was contrary to Alabama law.

On November 29, 1983, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, the opinion of which is submitted as Appendix "A". An application for rehearing filed in the Court of Criminal Appeals raising the same issues was denied without opinion on January 10, 1984.

Mr. Montgomery then petitioned the Supreme Court of Alabama for a writ of certiorari alleging substantially the same issues. The petition was denied without opinion on March 2, 1984.

## II

The petition is based on the following facts:

The Petitioner and two other men were arrested for the robbery of a grocery store. All three men were armed, but there was no violence. The owner of the store and a customer were bound, but the owner was able to call the police and give a description of the truck they left in.

The three men, including the Petitioner, were apprehended minutes later and brought back to the store where they were identified by the owner and the customer.

## SUMMARY OF THE ARGUMENT

The statute under which the petitioner was sentenced is unconstitutional in that it violates the Eighth Amendment rights prohibiting cruel and unusual punishment. The Alabama statute totally ignores the principle of proportionality so protected by this Honorable Court and mandates fixed punishment for various classifications of felony offenses. No guidelines are used by the Alabama Courts to aid them in establishing the appropriate punishment for the specific offense.

In order to invoke the recidivist statute in Alabama, it must be shown that the prior conviction used for enhancement of the sentence was either a felony under Alabama law or if from another jurisdiction would have "constituted" a felony under Alabama law. One of the prior convictions



intorduced at the Petitioner's sentencing hearing was a violation of a Federal law, failure to register a firearm with the National Firearms Registration and Transfer Record, and was not a felony under Alabama law. The use of the Federal conviction under the recidivist statute was a violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

## ARGUMENT

### I

The petitioner in the case at bar was sentenced under the provisions of the Alabama Habitual Felony Offender Act, §13A-5-9, Code of Alabama, 1975, to a term of life imprisonment without parole for the offense of robbery, a Class A felony. At the time of the sentencing the Alabama courts were without guidelines to follow in imposing prison terms under the habitual offender act. The only assistance given the sentencing courts were the range of punishment and the mandatory degrees of enhancement for repeat offenders. This area has since been somewhat clarified by a decision of this Honorable Court issued June 28, 1983, Solem v. Helm, \_\_ U.S. \_\_, 103 S.Ct. \_\_, 77 L.Ed.2d 657 (1983), wherein it was determined that in certain

cases the punishment imposed by a sentencing judge is disproportionate to the crime and is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.

This Court set forth criteria to guide the state courts in determining the sentence to impose. They are:

1. The gravity of the offenses and the harshness of the penalty.
2. A comparison of the sentence imposed on other criminals in the same jurisdiction.
3. A comparison of the sentences imposed for commission of the same crime in other jurisdictions.

When Mr. Montgomery was sentenced there was only one criteria for the trial judge § 13A-5-9(c)(3), Code of Alabama 1975, which mandates a sentence of life in prison without parole for conviction of a Class A felony after having been previously

convicted of any three felonies. No  
discretion is given to the judge, he was  
required according to the law to impose  
this sentence regardless of the circum-  
stances involved in the particular cases.  
In effect, the legislature has taken it  
upon themselves to be a moral judge and  
jury and to arbitrarily mandate that a  
person who has been convicted of any three  
felonies is an outcast and has no hope  
of possible rehabilitation, therefore,  
they should be consigned to the peniten-  
tiaries of this state forever. This is  
an official declaration by a law making  
body that an individual can no longer be  
beneficial to society because of his past  
transgressions. What could be a more  
cruel and unusual punishment to impose  
on a human being ? See Judge Frank M.  
Johnson's dissent in Terrebanne v. Blackburn,

646 F.2d 997 (5th Cir. 1981) This Court addressed this issue in Helm when they said that South Dakota had "rejected rehabilitation as a goal of the criminal justice system." It is apparent that this has also been done in our state.

Without applying the habitual offender act a class A felony in Alabama would normally carry a sentence of ten years to 99 years with possibility of parole, or if a firearm or deadly weapon was used 20 years to life, with the possibility of parole. However, with three prior felonies of any degree (A, B or C), a sentence of life without parole would be mandated on the conviction of a class A felony. If a person is convicted of producing obscene materials displaying minors (Class A) and has three prior convictions for fraudulent use of a credit card (Class C) then he would

also be sentenced to life without parole. In the same vein, a person convicted of murder (Class A) with two prior felonies is to be sentenced to life or any term not less than 99 years, but he does have the possibility of parole. His two priors could have been two murder convictions (Class A) or any two class C felonies, such as installing eavesdropping devices or setting off false alarms.

The requirements of the Alabama Habitual Offender Act clearly shows that in many instances the punishment is indeed disproportionate to the crime. In the instant case the appellant was convicted of a robbery where there was no violence committed, and he has been sentenced to life without parole. However, as the prior example shows, a person could conceivably

take the lives of two people and the third murder conviction would only result in a life sentence with the possibility of parole.

It is a travesty for this Court or the courts of the state of Alabama to allow a man to be arbitrarily sentenced to a prison term without the proper sentencing procedures being followed. The Alabama recidivist act is not in compliance with the requirements set forth by this Court in Solem v. Helm, supra. The legislature statute should be brought into conformity with the mandates of this our highest Court as it seeks to interpret our fundamental and basic rights as a citizen of the United States. To properly protect the rights of Mr. Montgomery as set forth in the Eighth Amendment, the criteria for determining the proportionality of the punishment must be

used. The Alabama statute by not adhering to these standards has violated the petitioner's inherent rights under the Eighth Amendment to the Constitution of the United States.

## II

The Petitioner further proposes to this Honorable Court that error resulted when the trial court used a prior Federal conviction to enhance his punishment under the habitual offender act.

The Federal conviction that made the of this argument is a violation of 26 USC 5861 (d):

" It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."



Mr. Montgomery was convicted for possession of a 20 gauge single barrell shotgun which had not been so registered.

Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules provides that:

" Any conviction in any jurisdiction including Alabama, shall be considered and determined to be a felony conviction if the conduct made the basis of that conviction constitutes a felony under Act 607, §130 (4), Acts of Alabama 1977, p. 812 (§13A-1-2 (4), Alabama Criminal Code, or would have constituted a felony under that section had the conduct taken place in Alabama on or after January 1, 1980."

It is proposition of the Petitioner that the possession of a firearm which has not been registered in the National Firearms Registration and Transfer Record does not constitute a crime under Alabama law and therefore cannot be considered a prior

felony for sentencing purposes.

In Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982), the defendant was sentenced under the habitual offender act and one of the prior convictions presented to the sentencing court was a conviction under a two count Federal indictment charging in count one the possession of a check stolen out of the United States mail and count two of unlawfully uttering and publishing a forged endorsement on the back of a United States Treasury check.

In the Carter, opinion issued by the Alabama Court of Criminal Appeals it stated that a federal conviction could be considered under the Habitual Offender Act if there is a State "counterpart" for the crime. The court determined that there was no corresponding state law under which a

person could be charged for possessing a check stolen from the United States mail and therefore a conviction based on such offense could not be used in habitual offender felony sentencing. The opinion went on to say that a conviction under count two could be used in state court since it is equivalent to our offense of possession of a forged instrument.

In the case under consideration now there is no correlative law in Alabama providing for an offense as set out in 26 USC 5861 (d). The Federal statute deals exclusively with compliance of a Federal act and as such the Federal government has exclusive jurisdiction of this offense. A person could not be charged and lawfully convicted in the Alabama state courts for failing to register a firearm in the National Firearms Registration and Transfer Record.

Therefore, the Federal case cannot properly be used as a felony conviction for the purpose of the habitual offender act. Using the Federal conviction as such invalidates the sentencing hearing and violates the appellant's due process rights under the Fifth Amendment to the Constitution of the United States. The Alabama Court of Criminal Appeals stated in their opinion that the proper objection was not made at the time of the sentencing hearing and therefor they would affirm. At the hearing the defense counsel objected on the basis that the proper predicate had not been laid for the introduction of this conviction, which was exactly the case. The State had failed to properly show that the Federal conviction would have also been a felony in Alabama, thus

failing to lay the foundation for compliance with Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules. In dealing with a sentence as harsh as life without parole it is compulsory that all aspects of the trial and sentencing are strictly complied with. To do otherwise would make a mockery of our judicial system and effectively undermine the right of due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution.

### CONCLUSION

In conclusion, the Petitioner, Chris Allen Montgomery, respectfully submits that the decision of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case presents conflicts with the prior decisions and opinions of this Honorable Court on numerous different points of constitutional law. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision of the Courts of Alabama and on such review will reverse the decision of the Alabama court and hold that §13A-5-9, Code of Alabama 1975, is in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States and that the Petitioner's due process rights under the Fifth and Fourteenth Amendments of the Constitution were effectively destroyed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 30 day of April, 1984, and addressed as follows:

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